In the Supreme Court of the United States

October Term, 1925.
Number 665.

The Village of Euclid and Harry W. Stein,
Inspector of Building,
Appellants,

vs.

The Ambler Realty Company,
Appellee.

REPLY BRIEF OF THE APPELLEE.

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REPLY BRIEF OF THE APPELLEE.

This brief on behalf of The Ambler Realty Company is filed by permission of the Court in response to the Reply Brief of the appellants.

The matters herein considered are as follows:

I. THE TRIAL IN THE COURT BELOW.

II. THE CLAIMS OF THE APPELLEE AS PLAINTIFF BELOW.

III. THE EVIDENCE ON THE QUESTION OF DAMAGE.

IV. SIMILAR ZONING ORDINANCES.

V. CONCLUSION, STATING RELIEF SOUGHT BY APPELLEE IN THIS COURT.

I.

THE TRIAL IN THE COURT BELOW.

In oral argument and in his reply brief, counsel for the appellant suggest that the trial court disposed of this case upon an inadequate consideration of the evidence. The fact is quite otherwise and the record is conclusive.

The bill of complaint was filed on the 5th day of May, 1923. (Rec. p. 1.) On the 20th day of July, 1923 the defendant filed a motion to dismiss, which was overruled on the 9th day of November, 1923. (Rec. p. 27) An answer was filed on the 14th day of November, 1923. (Rec. p. 28.) The case was argued and submitted on the 21st day of December, 1923. (Rec. p. 51.) Prior to the 21st day of December, when the case was argued, the parties had been engaged in the taking of evidence in deposition form, and all of the testimony had not been completely taken. The trial judge, however, gave unlimited time for oral argument and stated that counsel on both sides could state the facts and proofs as they believed they would be when the testimony was completed and that it could all be filed for his consideration before he decided the case.

Accordingly, on the 3rd day of January, 1924, counsel for the parties entered into a stipulation submitting all the testimony and exhibits to the Court, with the same effect as though they had been produced in open court, and submitting to the Court objections made as to competency, relevancy and admissibility as these objections appeared in the written transcript. (Rec. p. 51.)

On January 14, 1924, the trial judge filed his written opinion, in which he said:

> "Much of the evidence is immaterial; still more of it is without weight. Upon the facts the case really comes down to the provisions of the ordinance, certain physical facts characterizing the situation as it affects plaintiff's land, and the nature and extent of the impairment of its value by the ordinance restrictions. None of the important or controlling facts are in dispute, with the single exception of the extent of that damage; but even here there is no substantial denial that this damage is not only in excess of the jurisdictional amount but is substantial." (Rec. p. 52)

The Court then indicates a part of the evidence held by him to be immaterial and summarizes from the pleadings, exhibits and evidence the situation of fact out of which the legal questions to be decided arise. (Rec. p. 52.)

The trial judge lives in Cleveland and knows the situation. He doubtless knows all of the witnesses by name and reputation. He knows the physical situation, including the relation of the Village of Euclid to the metropolitan district of Cleveland, and for twenty years has watched the development of the business and industry of Cleveland, the changing character of many of the streets, the removal of industrial undertakings to new locations, and he is, therefore, ideally qualified to find, as he did find, that "the evidence clearly shows that the normal and reasonably to be expected use and development of the plaintiff's land along Euclid Avenue is for generally trade and commercial purposes, particularly retail stores and like mercantile establishments; and that the normal and reasonably to be expected use of the residue, including the restricted area, is for industrial and trade purposes. The evidence also clearly shows that the restrictive provisions of the ordinance in question impair the salability of this land and depress its present market value to the extent of several hundred thousand dollars. These restrictions, if sustained, the evidence further shows, will prevent the normal and reasonably to be expected increased value due to the availability of this land for trade, industrial and commercial purposes." (Rec. p. 53.)

On the 31st day of January, 1924, the final decree was entered. (Rec. p. 61.)

On the 28th day of July, 1924, the Court, by its order, settled the extent of the evidence and made the statements submitted in narrative form and approved by all counsel a part of the record. (Rec. p. 209.)

From the foregoing it is clear that all the claims of the parties as to the facts were freely stated in oral argument; that all of the testimony and exhibits were in the hands of the court from the 3rd day of January, 1924, to the 14th day of January, 1924, when the written opinion of the Court was filed; that the Court, in its opinion, discusses the testimony and exhibits, distinguishes the relevant from the irrelevant and extracts from the testimony all the facts admitted or controverted upon which the decision rests.

Those who know the diligence, ability and thoroughness which mark the work of the judge who tried this case will need no further assurance. Counsel for the appellants plainly did not feel that the trial court had failed to consider any part of the evidence, as no motion for a new trial was urged and no attempt made to call the Court's attention to matters now suggested to have been overlooked.

II.

THE CLAIMS OF THE APPELLEE AS PLAINTIFF BELOW.

The claims of the plaintiff below, as made by the bill of complaint, are three:

(1) That municipal councils have not the power and that state legislatures cannot give them the power, under the guise of the police power, to restrict uses of private property by selecting among admittedly innocent and inoffensive uses those which the municipal legislature prefers to have followed and prohibiting others equally inoffensive, to which the owners of property prefer, for economic or personal reasons, to devote it.

(2) That the provisions of Ordinance No. 2812 of the Village of Euclid are arbitrary, irrational and confiscatory, and that they are not in good faith an attempt to pursue

the police power, however generally that power may be defined in the interest of the public health, safety, morals or general welfare.

(3) That the operation of Ordinance No. 2812 upon the lands of the plaintiff has destroyed their salability by (a) restricting unlawfully the devotion of these lands to uses obviously appropriate and legitimate; and (b) by notifying prospective purchasers of land from the plaintiff that the Village of Euclid claims to exercise large but undefined, if not indefinable, powers of regulation and control so that prospective purchasers must face not only the irrational restrictions already attempted to be imposed but such further and future restraints upon the right of private property in the village as shall from time to time commend themselves to the political authorities of the village.

The result of this is that the plaintiff's market for its land is destroyed and a substantial part of the value of its land is confiscated.

Upon the foregoing three claims we comment briefly as follows:

(1) The power of the Village of Euclid derived from Section 3 of Article XVIII of the Constitution of Ohio, as set forth in the brief for the appellee at page 29, is that it

> "shall have authority to exercise all powers of local self government and to adopt and enforce within its limits such local police, sanitary and other similar regulations as are not in conflict with general laws."

Unless the power claimed here is a power of local self government, or this ordinance is such a "local police, sanitary or other similar regulation," then there is no power in the Village of Euclid to enact this ordinance. The Constitutional provision, it will be noted, speaks of local police

and sanitary regulations or regulations *similar* thereto. This language is definite, well understood and has limitations imposed by other provisions of the Constitution of Ohio and the Constitution of the United States, which are plain on their face and have been illustrated and enforced by decisions of this Court early and late, declaring that private property may not be taken for the public convenience or good, except by due process of law and upon the payment of compensation.

The constitutional guaranties of the rights of private property, which are universal in the State Constitutions of the United States and are further protected by inclusion in the Fourteenth Amendment to the Constitution of the United States, are not an idle form of words. They made their first formal appearance in our legal institutions in that provision of Magna Charta which provides:

> "39. NO FREE MAN SHALL BE TAKEN OR IMPRISONED OR DISSEISED, OR OUTLAWED, OR EXILED, OR ANYWAYS DESTROYED: NOR WILL WE GO UPON HIM, NOR WILL WE SEND UPON HIM, UNLESS BY THE LAWFUL JUDGMENT OF HIS PEERS, OR BY THE LAW OF THE LAND."

They have constituted a part of the right of all free men since that time. These rights are absolute and individual. They depend upon no communal consent and can be endangered by no legislative invasion. They are not abrogated by changes in public sentiment or weakened by a wide-spread public desire to ignore them as inconvenient in particular instances. Their value lies in their universality and their inviolability. The right of private property and the right of personal liberty are alike in this, that you can no more vote a man's property away from him than you can vote him into jail, and the fact that it would be more convenient to the public to vote his property away

from a property owner is as irrelevant as that it would promote the public convenience to vote him into jail.

These great fundamental rights are, of course, subject to limitations, but they are not nebulous limitations and are not subject to change each time a village council enacts a new definition.

Limiting our view to the right of private property, we find that Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibits any state from depriving any person of his property without due process of law. Now just what is property in the constitutional sense? It is the right of ownership, complete, absolute and continuous, including the right to use or not, transfer or not, at times and on terms which lie in the will of the owner, subject only to the following limitations:

(1) That the need of the state is paramount and when property is required for the public need, it must be taken on the terms and in the manner provided by law by the exercise of the right of eminent domain;

(2) That the state has the right so far to regulate the use of private property as to prevent a use by one man from invading the right of others to a similarly free use of their property or to create a hazard to the health, morals or safety of the public generally. This under the police power;

(3) Private owners of property may not offend the large public policy of our institutions by unreasonable restraints upon alienation or use, but the power of the courts here is exercised to relieve against arbitrary restraints and unreasonable restrictions and not to impose them.

The limitation upon private ownership which subjects it to the power of eminent domain requires that the purpose for which the public takes shall be a public purpose as against a private convenience, however widely distributed.

The police power is an entirely different power from the right of eminent domain. It would obviously serve the public convenience and welfare to have a broad highway laid out through a congested section and this may be done under the power of eminent domain when the public is prepared to pay the private owner the value of what it takes from him, but an attempt under the police power to restrict land in such fashion that it could serve no other than highway uses would be a plain violation of the Fourteenth Amendment and while no such bald instance has arisen, this Court has been called upon to declare unconstitutional an attempt to widen a highway by establishing set-back lines at the expense of the property owners, which is, in effect, the same thing. *Eubank vs. the City of Richmond,* 226 U. S. 137. See also *Pennsylvania Coal Company vs. Mahon,* 260 U. S. 393.

Under the foregoing principles it is, of course, competent for the state to abate or prohibit nuisance uses of private property under appropriate circumstances; to regulate the height of buildings, the strength of materials entering into them, the safety of their construction and the adequacy of their protection against conflagrational hazard, both as affecting the occupants of the building and the rest of the community. For like reasons it is competent for the state to regulate sanitary appliances, to impose minimum standards of light and air, to regulate factories, workshops and tenements and to prohibit and punish acts which tend to deprave the public morals. But these powers are traditional and were a part of our law from the beginning, amplified in their application to meet changing conditions and fuller knowledge. Under the pretense of exercising them, the constitutional safeguards may not be swept away. The Constitution can be amended but it may not be disregarded.

Nor would the people of the United States willingly consent to any amendment of the Constitution which abrogated these safeguards. If it were proposed to amend the Fourteenth Amendment to fit this case by making it read:

> "Nor shall any state deprive any person of life, liberty or property without due process of law, *except that private property may be devoted to such uses and such uses only as shall be permitted by laws duly enacted by the legislatures of the States and their subordinate governmental agencies,*"

the proposal would be regarded as the suggestion of an irreverent jester or a madman.

For these reasons, without unduly extending the argument even to its fair implications, the plaintiff in this action denies that the state may restrict the uses of private property by selecting among admittedly innocent uses, those which it prefers to have followed, and prohibiting others equally inoffensive; nor can we conceive that it makes any difference whether the incitement to these restraints comes from other property owners, as is the case in *Eubank vs. Richmond*, above cited, or from the spontaneous action of a majority of a municipal council, after a consultation with persons expert in mapping out future public conveniences and betterments by disregarding other people's property rights.

(2) The provisions of Ordinance No. 2812 (apart from those restricting the land of the plaintiff, are discussed in the brief of appellee for two purposes, first, as showing the unlimited extent of the power claimed by the Village of Euclid over the uses of land lying within it, since this claim of power, when it takes the form of actual legislation, constitutes a part of the menace which has destroyed the market of the plaintiff for its land, and, second, as showing that the whole ordinance is arbitrary, irrational and confiscatory and that the damage done to

the lands of the plaintiff cannot be justified by any assertion that they are incidental to an otherwise proper and reasonable regulation of property rights under the police power. Counsel for the appellee, of course, understand that this Court cannot properly be asked to accept anything so vague as the "validity of zoning" as an issue of law to be decided. But it is manifest that the Village of Euclid would have no purpose in imposing the restrictions it has sought to impose upon the plaintiff's land unless it could lawfully impose many, if not all, of the restrictions set forth in the ordinance upon the rest of the land in the village.

If, therefore, the village has wholly misconceived its power and is pursuing a purpose which it may not lawfully pursue, that fact will best appear from an examination of this entire ordinance. One of the virtues claimed for the ordinance is that it is comprehensive and hangs together in all its parts and that nobody has a right to complain, because all are equally injured or benefited, as the case may be.

That the ordinance is thus unreasonable and arbitrary is conceded by counsel for the appellant in his reply brief. On page 22 he discusses the provisions of the ordinance which exclude churches, schools, orphan asylums and other like desirable structures from U1 and U2 territory, and makes the remarkable defense that these objectionable provisions of the ordinance were not put in in good faith to be taken at face value, but are rather a device, cunningly conceived, for the purpose of requiring persons, who plan to build such structures, to consult with the City Planning Commission in order that they may be advised and guided by the wisdom of that body. It is easy to see what sort of advice would be given to the trustees of an unpopular religious denomination who sought to build

a church in the village or to the trustees of an orphan asylum or school whose wards were of a particular race or religion, and so suggested those distinctions upon which our most hateful and virulent prejudices are aroused.

But quite apart from these obvious suggestions it must be clear that the legislature may not prohibit legitimate uses of land, having in the back of its head all the time that it means to permit them, if the persons who propose them will first subject themselves to the benevolent counsels of an official body, for whose guidance no rules are laid down except that they must not take the language of the law of their creation as meaning what it says!

And what becomes of the theory which seeks to justify this form of zoning by saying that it fixes and establishes property rights and gives people assurance that if they improve their property with reference to one situation, they will not find it impaired by undesirable invasions in their neighborhood? If the fact be that the ordinance does not lay down a rule of action to be followed, but is merely a coercive invitation to consult the Planning Commission which, with the cooperation of the City Council, is really to have discretion *ad personam* as to each applicant, the assurance is a delusion. Nor is it any answer from this point of view to suggest that the plaintiff has never made an application for a permit to build a church or school (Reply Brief of Appellants, page 26) or that few, if any, applications have as yet been made for permits to erect stores on Euclid Avenue or industrial undertakings along the railroads as is suggested in many places in both briefs of counsel for the appellants. This ordinance, if it is anything, is a law and according to its own preamble was passed for the purpose of preserving the present character of the village, so that it announces what may be done for all time and can be justified only on the

assumption that its plan is not only wise, but will continue to be wise and desirable when the village population grows congested and the lands in the village are sought for all the normal uses of city life. Certainly the owners of private property are entitled to something more assured, as to the right to devote their property to innocent uses, than a conclusive presumption that the village council will always wisely decide what particular use of a piece of land best comports with the convenience or even welfare of the local public.

These considerations affect the plaintiff in two ways. Its land is in the Village of Euclid and will increase or diminish in value as the village is allowed to have its normal growth and development on one hand, or prevented from having it on the other, and many of the irrational and illegal restrictions of the ordinance bear directly upon the land of the plaintiff, as we shall now proceed to show.

(3) By ordinance No. 2812 the land of the plaintiff is divided up so that the portion of it lying adjacent to Euclid Avenue and for 620 feet in depth therefrom is U2 territory. The next 130 feet is U3 territory and the residue, about 1000 feet in depth, is U6 territory. It follows, therefore, that the plaintiff is prohibited from using the 620 feet adjacent to Euclid Avenue for any other purpose than single family residences or two family residences. But there is no scrap of testimony in this record which in the slightest degree supports an assumption that the public health, safety, morals, general welfare or even convenience would be prejudiced by the building of banks, schools, churches, apartment houses or retail or wholesale stores on this property. Similarly with regard to the strip 130 feet designated U3, there is no basis for an assumption, unreasonable on its face, that that land is not available for and suitable for the building of banks, offices,

telephone exchanges, retail stores, sales rooms, printing offices and a large number of other uses which are prohibited by the ordinance. Indeed there is affirmative evidence in the record as to the propriety of these uses.

It is suggested in oral argument and said in the reply brief of the appellant that the purpose of these prohibitions is to prevent the building of railroad switch tracks up to Euclid Avenue, but the obvious way to prevent that is to prohibit it in plain terms, and in any case railroad switch tracks are not necessary for apartment houses, churches, banks and many other uses which are peremptorily prohibited in U2 and U3 territory.

As a matter of fact, we think this record shows that the entire tract of sixty-eight acres owned by the appellee is best fitted for development by large industries which, according to the modern practice, would put their shipping facilities near the railroad tracks, their manufacturing facilities south of that, their store rooms and stock rooms still further south and use Euclid Avenue frontage for office buildings and such show rooms as are desirable and useful. This suggestion is not fanciful, but is an actual description of what modern industry is now doing whenever it can find land so admirably adapted as the plaintiff's tract. Its nearness to its labor market is facilitated by having an entrance on a great traffic highway like Euclid Avenue. The attractiveness of its premises is a part of the advertising done by the industry and the orderly progress of manufactured products through the plant, carries them in succession from the raw material supply to the factory, then into the stock room, and then into the shipping room, and thence on the railroad, so that the economies of industrial construction place the more attractive entrance on the public thoroughfare and

house the office and clerical forces on the public street away from the manufacturing and shipping ends.

The economies of modern production likewise dictate large land area and low buildings, to make possible continuous manufacturing operations without changes of floor, so that the plaintiff's tract is literally ideal in size, location and access to transportation facilities for such development, and the high cost of land so favorably situated, is only incidental to the saving which follows from these advantages. The Cleveland Tractor Company development immediately to the west, although temporarily suspended at the point where it has developed the first units of its factory adjacent to the railroad, shows exactly this trend. The land was acquired clear out to Euclid Avenue and as the company prospers and develops, exactly the improvements here suggested will characterize it.

But in any case, if it should turn out better to use Euclid Avenue frontage for stores or office buildings or banks or apartment houses, that could always be done and whether or not it is the better thing to do can be determined by no criteria so successfully as the economic advantages of one mode of treatment over another.

Our contention, therefore, is that ordinance No. 2812 does not attempt merely to prevent the building of switch tracks near Euclid Avenue, or to limit or prevent any other nuisance or unwholesome or unpleasant industry, but that it arbitrarily prohibits a whole category of innocent uses to which the plaintiff is entitled to devote its land, and that neither the ordinance and the briefs of counsel nor the oral suggestions of counsel in argument, supply any justification for these confiscatory restrictions.

III.

THE EVIDENCE OF THE QUESTION OF DAMAGE.

We will try to answer all that appellant has to say in its supplemental brief with regard to the value of plaintiff's land, unrestricted and as restricted by the ordinance in one general statement.

It will first be noted that appellee, by the various maps and photographs put in evidence, attempted to present to the court, as fully as practicable, the real physical conditions of appellee's land as well as similarly situated lands and the other territory of the Village. These maps and photographs show much the larger part of the land, between Euclid Avenue and the Nickel Plate Railroad, to consist of large undeveloped tracts—more or less land abandoned for farm use and awaiting its use and demand incident to the expanding needs of the growing metropolitan district, of which the territory of the Village is an integral part.

In the consideration of the value of plaintiff's land and other similar lands between Euclid Avenue and the Nickel Plate Railroad, there are, of course, many facts of which the Court will take judicial notice in connection with the admitted facts. The ordinance itself stamps the northerly end of appellee's land as industrial territory and this is true of all the other like lands similarly classified as U6 territory. The fair inference from this fact, supported by all the testimony, is that its development will primarily be for factory purposes. Certainly it cannot be considered as marketable for desirable residence use, and the reasons which make it undesirable, for such use, also diminish the value of the 750 foot strip lying between the industrial section and Euclid Avenue. A residence built within a few hundred feet of a factory, in U6 territory, is no more desirable to live in, if constructed within the same distance

from the same factory, even if it is built in territory classed by the ordinance as a U3 or U2 district. It is not disputed that Euclid Avenue, in the Village, is a main business street throughout its whole length and, as the Village develops, the frontage thereof in the Village will more and more be devoted to business—one cannot conceive of zoning, if the power be upheld, more than temporarily retarding such development. It must therefore follow that the part of plaintiff's lands, lying between the U6 line and Euclid Avenue, is not desirable for residence use and, not being desirable one would not expect it would be marketable for such purpose,—particularly is this true if industry and business located in residence neighborhoods are a "blight" as the advocates of "zoning" insist.

With such facts in mind, it seemed to us that the testimony as produced by appellee from the witnesses as to the value of appellee's land in the "raw," as a whole for any use (unrestricted), and its value as a whole restricted to residence use, would present the evidence of value to the Court in the most helpful way. Euclid Avenue, however, being a fully improved street affected the value of frontage thereon, so we supplied proof of its value separately unrestricted and restricted.

Appellant contends that because, except for the distance of 750 feet back from Euclid Avenue, the appellant can use his land for industrial purposes, and because some of the testimony as to value was given regarding the 68 acres as a whole—no damage has been shown. We have again checked the figures as to value in our main brief and find them fully supported by the record. But to aid the Court we will add the following which we think will make the presentation clear—confining ourselves first to that part of appellee's land within 620 feet of Euclid Avenue placed by the ordinance in U2 territory, and there-

by limited to single or two family residence uses. All the witnesses agree that this could well be developed for industrial uses if switches are set in from The Nickel Plate Railroad, *not switches up to the street but to give service on the rear of such frontage.* All the witnesses, however, agree that probably the most advantage could be attained by selling off the Euclid Avenue frontage to a depth of 150 or 200 feet for business and then developing for industrial use the rest of the tract. All the witnesses agree that this Euclid Avenue frontage is worth considerably more unrestricted against business—we repeat the figures as given.

Witness	Residence Use	Business
Kunkle	$60	$150 to $175
Witzel	60	150
Laronge	60	100
Greenlund	75 to 100	150 to 300
	4)280	4)725
	70	181.25

The 68 acres has about 1800 feet of such frontage and on the basis of the average of the highest of such figures the damage to appellee would be $200,450.00. Appellants' briefs, unless we have overlooked it, do not refer to these figures.

Taking off 200 feet for the depth of Euclid Avenue frontage there is left a strip 420 feet wide of said U2 territory. As to this appellants' witness Greenlund testified (Rec. 190) it "could be *developed* for residence purposes and *sold* for about $8400 to $8500 per acre." He had been asked how much of the selling price would have to be first put up by the allotter for development, selling and carrying expense. He said (Rec. p. 189)—

> "As to whether the ordinary allotter, allotting property for residence purposes, figures roughly approximately 25 per cent for raw land, 25 per cent for his carrying charges, and 25 per cent for his selling expense, and possibly 25 per cent profit, I don't know whether they all use the same or not. I am willing to accept your figures, but I think they are high."

At page 191 he also says that such percentages are too high but it all indicates that an allotter would not expect to pay much more than 25% of his expected retail selling price for "raw" land to be allotted.

Referring to this same strip between the Euclid Avenue frontage, 200 feet deep, and the 750 foot line, north of Euclid, restricted to residence purposes, witness Laronge, called by appellants, said (Rec. p. 202):

> "For the Ambler tract, eliminating 200 feet frontage on Euclid Avenue, I would say it would be worth $2000.00 per acre. That would be the value of the strip between the 200 foot frontage line on Euclid Avenue and the 750 foot line north of Euclid Avenue, for the same purpose, assuming you had streets which would give you ingress and egress to and from Euclid Avenue and the limited residence zone."

This same witness (Rec. 196) placed the value of this same acreage for industrial purposes at $8000.00 per acre. Witness Greenlund placed (Rec. p. 195) its value if sold for industrial purposes as follows, "If it were worth $6000.00 per acre as it is, it ought eventually to sell for from $8500 to $12000 per acre cut up into small parcels." Of course the cutting up to sell for industrial purposes would require a switch to be put in but that is more or less a nominal expense (Rec. p. 73).

These two witnesses, Greenlund and Laronge are the experts on whom appellant principally relies.

The strip if 420 feet wide, 1800 feet long would contain approximately 17 acres. On the basis of witness Laronge's figures, restricting said strip to residence purposes would decrease its market value $6000.00 per acre, or a loss to appellee of $102,000.00. This figure would be greatly increased if the values given by appellee's witnesses were used in the computation.

We have not separately referred to the 130 foot strip of U3 territory, prescribed by the ordinance lying, next northerly of the 620 feet of U2 land. It is apparent that, lying next adjacent to a factory district, it would have little if any value for U3 uses except for "Office Buildings and Buildings to maintain clerical help" as provided by the amendment (Rec. p. 44) to such U3 classification. And it would only have such value for such use if it could just happen to be combined with U6 territory in the rear. Except for this one use all that we have said about the 420 foot strip next south would apply to the 130 feet.

If the Court should attach any importance to the claim of appellant that some of the testimony of appellee's witnesses as to value was addressed to 68 acres as a whole rather than to the parts as separately zoned, we are quite sure that what we have said above will satisfy the Court that the values given by such witnesses were intended to apply to each acre of the whole, except as *otherwise* explained in their testimony, and was so understood by Court and counsel on hearing below.

Counsel for appellant at page 12 of his reply brief says that witness Laronge placed a value of $11,000.00 per acre on the 420 foot strip developed for residence purposes. He has failed to point out that this figure was the retail selling value per acre, cut up into 40 foot lots, with streets fully improved from which must be deducted

the cost of improvements, selling expense, carrying charges and profit to the allotter over the cost of the "raw" land. The testimony, which we quote above from this witness (Rec. page 202) giving $2000.00 as the maket value of the "raw" land for allotting purposes is the figure which we believe must be used.

As bearing on values of and demand for the land in question, again and again throughout appellant's brief occur statements to the effect that few if any stores or factories have been built within zones permitting such since the passage of the ordinance. The ordinance was passed November 13, 1922, appellee's bill was filed May 5, 1923, and all the evidence was put in during 1923. The Court will take judicial notice that business and industry had then barely begun to recover from the depression following the War, and all such references are almost wholly beside the record. It is true that there was not a rush of demand at the time of trial for business locations on Euclid Avenue. The maps disclose most of the territory along Euclid Avenue except at the old Village center at and near Chardon Road to be undeveloped—not even side streets laid out off from Euclid Avenue. But the evidence clearly shows a potential demand having a direct bearing on values and tending to determine the expected development.

At pages 45 and 46 of appellant's reply brief, in a "parallel column" form, there is an attempt to state what appellee has not proved of the allegations of the bill. We refer only to one matter—the actual industrial development within the appellant Village. At pages 70 and 71 witness Kunkle by name and description of each plant testified to just what the development then was and we believe that it fully sustains the bill.

IV.

SIMILAR ZONING ORDINANCES.

During the oral argument of this cause, counsel were asked by the Court whether, in a general way, zoning ordinances resembled that passed by the Village of Euclid. An answer somewhat more at large than was possible then may be helpful to the Court.

In a general way, zoning ordinances will be found to attempt regulations from three points of view,—height of buildings, proportionate area of lots permitted to be occupied, and uses to which land may be devoted.

Height restrictions have, of course, long been justified by obvious considerations of public safety. Reasonable regulations, with regard to the proportionate part of lot areas permitted to be occupied, have been similarly sustained by considerations of public health, based upon the need for light and air.

Use regulations have been justified wherever proposed uses involve nuisance features, as in the case of *Hadacheck vs. Sebastian,* 239 U. S. 394. There are, therefore authoritative cases which sustain the police power, operating from these three points of view and within these limits. Some "zoning ordinances" attempt to go no further and the fact that such regulations are contained in a comprehensive ordinance is no argument against them if they are reasonable and properly adjusted to the conditions to which they are to apply.

Many so-called zoning ordinances go much further than this and the excesses are almost always with regard to one or the other of two matters, first, attempts to widen streets by enforcing set-back lines, rather than by appropriating property and paying for it, and second, the uses to which property may be devoted. With regard to

the latter the impulse primarily came from a desire to limit the building of apartment houses, but gradually the apparent possession of power tempted the "experts" into aesthetic fields, and so many of the ordinances go much further.

We have examined copies of such zoning ordinances as are available to us in the public library of Cleveland, and for the convenience of the Court, we print here from them the restrictions in "residence districts." The restrictions are drawn, as the Court will observe, for large and populous cities, where the problems of congestion, traffic and transportation are serious as compared with the open country and undeveloped lands of the Village of Euclid, and yet it will be noticed that very many of the uses which the Village of Euclid prohibits in U1 and U2 territory, which together comprise half of the total area of the Village, are freely permitted in residence districts in these other cities.

A comparison of the restrictions in ordinance No. 2812 with those in the ordinances hereafter cited will show that nowhere has any such intensive and minute classification been attempted. Most of these cities have undertaken in a large way to separate residence uses, business uses and industrial uses, but the Village of Euclid imposes far more burdensome restrictions and devotes more than half of its area to single family residences, while it thrusts apartment houses, hotels, clubs, churches and banks, to say nothing of retail drygoods and grocery and drug stores, down either into or immediately adjacent to the district declared by it appropriate for heavy industrial uses.

ZONING ORDINANCE OF THE CITY OF DENVER.

Use District Regulations.

Section 3. Residence District Uses. A. Residence "A" District. In a residence "A" district no building or premises shall be used, and no building shall be erected which is arranged, intended or designed to be used, for other than one or more of the following uses:

(1) Single family dwelling. Two family dwelling Multiple dwelling.

(2) Church. School. Public Library. Public museum. Community building.

(3) Public park. Public playground. Public recreation building. School or college stadium or athletic field. Golf course. Polo field. Water supply reservoir, well, tower or filter bed.

(4) Railway right of way, not including railway yards. Passenger station.

(5) Farming. Nursery. Truck gardening. Non-commercial conservatory for plants and flowers.

(6) Private garage as provided in Section 10.

(7) Private club, excepting a club the chief activity of which is a service customarily carried on as a business.

(8) Philanthropic institution other than a penal or correctional institution. Hospital or sanitarium other than for contagious or infectious diseases and other than for the insane or feeble-minded.

B. Residence "B," "C" and "D" District. In a residence "B," residence "C" or residence "D" district no building or premises shall be used and no building shall be erected or structurally altered which is arranged, intended or designed to be used, for other than one or more of the following uses:

(1) A use permitted in a residence "A" district.

(2) Hotel. Dormitory. Sorority or fraternity house. Boarding house or rooming house.

C. Residence "E" District. In a residence "E" district no building or premises shall be used and no building shall be erected or structurally altered which is arranged, intended or designed to be used for other than one or more of the following uses:

(1) A use permitted in a residence "A," residence "B," residence "C" or residence "D" district.

(2) Office. Studio.

ZONING ORDINANCE OF THE CITY OF ROCHESTER, N. Y.

Residential Districts.

Section 6. In a Residential District not lying within the boundaries of a district designed upon the maps as an "E" District, no business, trade or industry shall be conducted, and no land shall be used, or structures used or erected, except as otherwise herein provided, for other than one or more of the following specified uses, or for purposes necessarily or ordinarily accessory to such uses:

Dwellings of all classes;
Tenement houses;
Four-family dwellings or flats;
Hotels;
Lodging houses;
Boarding houses;
Clubs, excepting clubs the chief activity of which is a service or accommodation customarily carried on as a business—as a garage;
Churches or convents;
Schools;
Libraries or public museums;
Private offices of a physician, surgeon or dentist;
Philanthropic or eleemosynary uses or institutions other than correctional institutions;
Railroad passenger stations;

Real estate signs advertising the sale, rental or lease of the premises upon which they are maintained;

Recreational buildings in public parks and playgrounds;

Hospitals and sanitariums;

Farming, truck gardening, nurseries and greenhouses.

An accessory use shall not include a business, trade or industry, nor shall it include any structure not located on the same or adjoining lot under the same ownership, with the building or structure to the use of which it is accessory. A private garage for more than five motor vehicles, or a private garage for more than three motor vehicles, if used or erected as part of a common garage built upon and across the adjoining line of a lot under a different owner, or a private stable for more than three horses, shall not be considered an accessory use except upon a farm.

RESIDENTIAL DISTRICTS, CLASS E.

Section 7. In a Residential District lying within the boundaries of a district designated upon the maps as an "E" district, no business, trade or industry shall be conducted, and no structure shall be used or erected, except as otherwise herein provided, for other than one or more of the following specified uses, or for purposes necessarily or ordinarily accessory to such uses:

Single dwellings;

Two-family dwellings, double houses or Boston flats;

Clubs, excepting clubs the chief activity of which is a service customarily carried on as a business, such as a garage, apartment house or hotel;

Churches and convents;

Schools;

Libraries;

Private offices of a physician, surgeon or dentist;

Railroad passenger stations;

Real estate signs advertising the sale, rental or lease of the premises upon which they are maintained;

Recreational buildings in public parks and playground;

Farming, truck gardening, nurseries and greenhouses.

An accessory use shall not include a business, trade or industry, nor shall it include any structure not located on the same or adjoining lot, under the same ownership, with the building or structure to the use of which it is accessory. A private garage for more than five motor vehicles, or a private garage for more than three motor vehicles if used or erected as part of a common garage built upon and across the adjoining line of a lot under a different owner, or a private stable for more than three horses, shall not be considered an accessory use except upon a farm.

ZONING ORDINANCE OF EVANSTON, ILLINOIS.

Section 3.—"A" Residence District.

In the "A" Residence District all buildings and premises, except as otherwise provided in this ordinance, shall be erected for and used exclusively as:

1. Single Family Dwellings.
2. Churches and Temples.
3. Schools and Colleges.
4. Libraries.
5. Farming and Truck Gardening. And the usual accessories located on the same lot, not involving the conduct of a retail business, including a private garage, private stable or community garage when located not less than fifty (50) feet from the front lot line or in a fireproof compartment as a part of the main building, and including also home occupations engaged in by the occupants of a dwelling not involving the conduct of a retail business on the premises.

SECTION 4.—"B" RESIDENCE DISTRICT.

In the "B" Residence District all buildings and premises except as otherwise provided in this ordinance, shall be erected for and used exclusively as:

1. Any use permitted in the "A" Residence District.
2. Tenement Houses.
3. Hotels.
4. Private Clubs and Fraternity Houses.
5. Boarding and Lodging Houses.
6. Institutions of an educational, philanthropic or eleemosynary nature.
7. Nurseries and Greenhouses.
8. Public Garages, and their accessories, subject to compliance with the present ordinance requirements of the City of Evanston or those hereafter adopted.

ZONING ORDINANCE OF THE DISTRICT OF COLUMBIA.

SECTION III—RESIDENTIAL DISTRICT.

In the residential district all buildings and premises, except as otherwise provided in these regulations, shall be erected for and used exclusively as:

1. Dwelling.
2. Apartment houses or tenements.
3. Hotels.
4. Lodging or boarding houses.
5. Churches.
6. Private clubs.
7. Hospitals or sanitariums.
8. Institutions of an educational, philanthropic or eleemosynary character.
9. Transportation right of way or passenger stations.

10. Farms, truck gardens, nurseries or greenhouses.

11. Sand, gravel or clay pits.

12. The usual accessories located on the same lot with these various buildings not involving the conduct of a business, but including the office of a physician, dentist, or other person, when situated in the same dwelling or apartment used by such person as his or her place of residence and including also one private garage or private stable, located not less than 50 feet back of the front building line or in a fireproof compartment as a part of the main building and including also home occupations engaged in by the occupants of a dwelling not involving the conduct of a business on the premises; Provided, that no window display nor any sign other than a name plate not exceeding one square foot in area, and bearing only the name and occupation of the occupant shall be allowed as appertaining to use as offices or for home occupation as permitted under this section.

Provided, that in the residential district a public garage where no repair facilities are maintained, may be established, erected or enlarged if, when permit is issued, there are on file with the Commissioners of the District of Columbia, the written consents of the owners of 75 per cent of (a) the property within the square where it is proposed to establish, erect or enlarge such garage, and (b) any other property within 200 feet of the proposed establishment and not separated therefrom by a street; Provided, however, that no part of said garage shall be within 75 feet of any street building line. In computing the area of consents required under this regulation, so much of the property as is used as public garages or stables shall be counted as consenting. And provided, further, that private garages housing not more than two steam or motor driven vehicles and not appurtenant to a dwelling may be erected without consents when located 50 feet or more back of the building line of the nearest street, if abutting and opening directly upon a public alley.

The Commissioners of the District of Columbia may issue permits for a period of not more than one year for the erection in the residential district of buildings for commerce or industry, where such buildings are incidental to the residential development; and may issue permits for temporary use of premises by fairs, circuses or carnivals upon compliance with the Police Regulations of the District of Columbia.

ZONING ORDINANCE OF THE CITY OF DETROIT.

SECTION THREE. RESIDENCE DISTRICTS.

In a residence district no buildings or premises, except as otherwise provided in this ordinance, shall be erected or used except for one or more of the following uses:

1. Dwellings.

2. Churches.

3. Clubs, except clubs the chief activity of which is a service customarily carried on as a business.

4. Community garage, except in thirty-five foot height and bulk district.

5. Farms.

6. Greenhouses.

7. Hospitals or sanitaria.

8. Hotels, provided they conform to all the requirements of this ordinance for dwellings.

9. Institutions of an educational or philanthropic character other than correctional institutions.

10. Lodges or Temples.

11. Nurseries.

12. Railroad local passenger stations.

13. Accessory uses customarily incident to any of the above uses, including not more than one private garage but not including the conduct of a business. The term accessory use shall not include a use lo-

cated within fifty feet from the front lot line unless in the same building to which the use is accessory.

Signs pertaining to the lease, sale or use of a lot or building may be placed thereon, provided the total area of all such signs does not exceed eight square feet, and provided further that on a lot occupied by a dwelling the total area of signs placed on the lot or dwelling and pertaining to the use thereof or bearing the name or occupation of an occupant, shall not exceed one square foot for each family housed.

(For garages not herein permitted, cemeteries and temporary uses or buildings, see under Sec. XV-11 and XVI-5, 6, 7, 8.)

ZONING ORDINANCE OF THE CITY OF OMAHA, NEBRASKA.

Section 3. "A" Residence District.

In the "A" Residence District no building or premises shall be used and no building shall be hereafter erected or altered, unless otherwise provided in this ordinance, except for one or more of the following uses:

(1) One and Two-family Dwellings.

(2) Churches.

(3) Schools, Elementary and High.

(4) Libraries, Museums, Parks, Playgrounds, Branch Telephone Exchanges and Community Buildings owned and controlled by the municipality.

(5) Farming and Truck Gardening.

(6) Hospitals or Institutions of an Educational, Philanthropic or Eleemosynary Nature.

(7) Accessory buildings (See Section 17H) including one private garage when located not less than sixty (60) feet from the front line or within or attached to the dwelling. A private garage may exceed three (3) vehicle capacity provided the area of the lot whereon such a private garage is to be located shall contain not less than one thousand (1,000) square feet for each vehicle stored. The location of all private

stables shall be subject to the regulations of the Board of Health.

(8) Uses customarily incident to any of the above uses when located on the same lot and not involving the conduct of a business; including home occupation not involving the conduct of a business on the premises, and the office of a physician, surgeon, dentist, musician or artist, when situated in dwellings; provided no name plate shall exceed one (1) square foot in area. No signs exceeding eight (8) square feet in area appertaining to the lease, hire or sale of a building or premises, nor advertising sign of any other character shall be permitted in any "A" Residence District.

SECTION 4. "B" RESIDENCE DISTRICT.

In the "B" Residence District no building or premises shall be used and no building shall be hereafter erected or altered unless otherwise provided in this ordinance, except for one or more of the following uses:

1. Any use permitted in the "A" Residence District.
2. Multiple Dwellings.
3. Boarding and Lodging Houses.
4. Hotels.
5. Hospitals and Clinics.
6. Institutions of an educational, philanthropic or eleemosynary nature.
7. Nurseries and greenhouses for the propagation and cultivation of plants only.
8. Private Clubs, Fraternities, Lodges, excepting those the chief activity of which is a service customarily carried on as a business.
9. Accessory Buildings (See Section 17h) including private and community garages, when located not less than sixty (60) feet from the front lot line or within or attached to the dwelling. A private or community garage may exceed a three (3) vehicle capacity pro-

vided the area of the lot whereon such a private garage is to be located shall contain not less than one thousand (1,000) square feet for each vehicle stored. The location of all private stables shall be subject to the regulations of the Board of Health.

10. Uses customarily incident to any of the above uses when located in the same lot and not involving the conduct of a business; including home occupation not involving the conduct of a business on the premises, and the office of a physician, surgeon, dentist, musician or artist, when situated in the dwelling; provided no name plate exceeding one (1) square foot in area, nor a sign exceeding eight (8) square feet in area appertaining to the lease, hire, or sale of a building or premises, nor advertising sign of any other character shall be permitted in any "B" Residence District.

ZONING ORDINANCE OF THE CITY OF PITTSBURGH.

Section 8. "A" Residence District. In this district the land may be used and buildings may be erected, altered or used only for the following

PERMITTED USES:

(1) One Family Dwelling;

(2) Two Family Dwelling;

(3) Double House;

(4) Multiple-Dwelling Class "A";

(5) Multiple-Dwelling Class "B";

(6) Church;

(7) Institution (public or semi-public) educational or charitable;

(8) Telephone Central Exchange, Sub-Station of Electric Light Works without Rotary Machinery, or Gas Regulating Station;

(9) Garden (Including Truck Garden);

(10) Nursery, Horticultural;

(11) Greenhouse;

(12) Accessory Uses incident to any of the principal uses above listed and not involving the conduct of a business. These accessory uses shall be:

(a) Accessory uses customarily incident to the above uses.

(b) A minor garage located not less than sixty (60) feet from the front lot line if a separate building, or in a suitable room within or attached to the dwelling. In the case of a corner lot no wall of the garage shall be nearer the street line than the side line of the main building, and also it shall be as far from the street as the line fixed by this ordinance for buildings on adjoining lots or as near thereto as the width of the lot will permit. In the case of a through lot, no wall of the garage shall be nearer to the rear frontage than the line fixed by this ordinance for buildings on adjoining lots, or nearer than fifteen (15) feet.

(c) A minor stable located not less than sixty (60) feet from the front lot line. In the case of a corner lot no wall of the stable shall be nearer to the street than the line fixed by this ordinance for buildings on adjoining lots. In the case of a through lot no wall of the stable shall be nearer to the rear frontage than the line fixed by this ordinance for buildings on adjoining lots or nearer than fifteen (15) feet.

(d) A sign or signboard, not exceeding eight (8) square feet in area, appertaining to the lease or sale of the premises.

(e) A name plate, not exceeding one (1) square foot in area.

(f) A sign or bulletin board, not exceeding eight (8) square feet in area, erected upon the premises of a church or other institution for the purpose of displaying the name and activities or services therein provided.

Section 9. "B" Residence District. In this district the land may be used and buildings or structures may be erected, altered or used only for the following

PERMITTED USES:

(1) One Family Dwelling;

(2) Two Family Dwelling;

(3) Double House;

(4) Church;

(5) School (Including Dormitory for Faculty or Students);

(6) Library;

(7) Garden (Including Truck Garden);

(8) Nursery, Horticultural;

(9) Greenhouse;

(10) Accessory Uses: (The Provisions shall be the same as prescribed in "A" Residence District, See Section 8).

ZONING ORDINANCE OF THE CITY OF MILWAUKEE.

SECTION 2. RESIDENCE DISTRICTS.

In a residence district no building, structure or premises shall be used and no building or structure shall be erected which is arranged, intended or designed to be used except for one or more of the following specified uses:

1. Single family dwellings, two family dwellings, apartment or tenement houses.

2. Lodging or boarding houses, dormitories or convents.

3. Hotels.

4. Clubs, excepting clubs the chief activity of which is a service customarily carried on as a business.

5. Churches.

6. Schools, colleges, libraries or public museums.

7. Philanthropic and eleemosynary uses or institutions, other than correctional institutions.

8. Hospital or sanitaria.

9. Railroad passenger stations.

10. Farming, truck gardening, nurseries or greenhouses.

11. Accessory uses customarily incident to the above uses. The term accessory use shall not include—

a. A business outside the building to which it is accessory, or which occupies a total floor area in excess of 25 per cent of the floor area of one story of such building, or which by reason of the appearance of the building or premises, or the emission of odor, smoke, dust or noise or in any other way is objectionable or detrimental to the residential character of the neighborhood, or which involves features in design not customary in buildings for the above uses or any structural alteration of the building.

b. A garage other than a private garage on a lot occupied by not more than two families.

c. A group of private garages for more than four automobiles.

d. The storage of more than one commercial vehicle.

12. In undeveloped sections of the city a temporary building for use incidental to the residential development erected and so used for a period of two years from the date of the permit.

ZONING ORDINANCE OF THE CITY OF SEATTLE.

SECTION 3. FIRST RESIDENCE DISTRICT.

(a) The following uses only are permitted in a First Residence District:

(1) Single Family Dwellings.

(2) Public Schools.

(3) Private Schools in which prescribed courses of study only are given and are graded in a manner similar to public schools or are of a higher degree.

(4) Churches.

(5) Parks and Playgrounds (including usual park buildings).

(6) Art Gallery of Library Building.

(7) Private Conservatories for Plants and Flowers.

(8) Railroad and Shelter Stations.

(b) In a First Residence District, buildings and uses such as are ordinarily appurtenant to dwellings shall be permitted, subject to the limitations herein provided. A garage in a first residence district shall not occupy more than seven per cent (7%) of the area of the lot, and the business of repairing motor vehicles shall not be conducted therein. In the case of a private stable, the written consent must be obtained of the owners of fifty (50) per cent of the property within a radius of two hundred (200) feet of the proposed building. The number of animals, not counting sucklings, in a private stable shall not exceed one for every two thousand (2,000) square feet contained in the area of the lot on which such building is located. Not more than one appurtenant building having a floor area of not to exceed thirty (30) square feet which is used for the housing of domestic animals or fowls shall be permitted on any lot in the First Residence District, except that a building of greater area or a greater number of buildings shall be permitted when the written consent shall have been obtained of the owners of fifty (50) per cent of the dwellings within two hundred (200) feet of the proposed building; provided that such consent shall not be required if the number of said dwellings is less than four (4). The office of a physicial, dentist, or other professional person when located in his or her dwelling, also home occupations engaged in by individuals within their dwell-

ings shall be considered as accessory uses, provided that no window display is made or any sign shown other than one not exceeding two (2) square feet in area and bearing only the name and occupation of the occupant. The renting of rooms for lodging purposes only, for the accommodation of not to exceed six (6) persons, in a single family dwelling shall be considered an accessory use.

(c) A fraternity house, sorority house, or boarding house when occupied by students and supervised by the authorities of a public educational institution, a private school other than one specified in paragraph (a), this section (3), a community club house, memorial building, nursery or greenhouse or a building which is necessary for the proper operation of a public utility may be permitted by the Board of Public Works after a public hearing.

(d) Whenever the side line of a lot in the First Residence District constitutes the boundary of a Business District or where said Boundary Line extends entirely across said lot from front to rear then a multiple family dwelling such as a flat or an apartment house shall be permitted on said lot provided that such use shall not extend more than sixty (60) feet from said district boundary line.

(e) Nothing in this section shall be construed to prohibit the use of vacant property for gardening or fruit raising or its temporary use, conformable to Law, for fairs, circuses or similar purposes.

SECTION 4. SECOND RESIDENCE DISTRICT.

(a) The following uses only are permitted in a Second Residence District:

(1) Any use permitted in a First Residence District.

(2) All dwellings, flats, apartment houses and boarding or lodging houses without stores.

(3) Clubs or fraternal societies, except those the chief activity of which is a service customarily carried on as a business.

(b) Hospitals, sanitariums and institutions for philanthropic and eleemosynary uses, other than correction, shall be permitted in the Second Residence District, except that no private hospital or sanitarium for the treatment of inebriates or persons suffering from insanity or other mental diseases shall be established or maintained within the City of Seattle in any building situated within 200 feet of any private property, the owner of which has not consented in writing to the location and maintenance of such hospital or sanitarium nor in any building without a written permit from the Commissioner of Health of the City of Seattle. (See also Section 17, Paragraph (g).)

(c) In a Second Residence District, all the accessory uses specified in the First Residence District under Section 3, paragraph (b) shall be permitted, provided that all the requirements therein governing such uses are complied with. Uses listed in paragraph (c), Section 3, shall be permitted in a Second Residence District without public hearing or the consent of surrounding property.

(d) In a Second Residence District a garage located on the same lot with an apartment house may be permitted by the Board of Public Works after a public hearing, provided that the number of motor vehicles so housed shall not exceed the number of apartments within said apartment house, and provided further, that no repair shop, service station, or other business shall be conducted in connection therewith.

ZONING ORDINANCE OF THE CITY OF BALTIMORE.

Sec. 3. Residence Districts.

(a) In a residence district no building or land shall be used and no building shall be erected which is arranged, intended or designed to be used except for one or more of the following specified uses:

(1) Dwellings.

(2) Lodging or boarding houses, dormitories or convents.

(3) Hotels which have more than twenty sleeping rooms.

(4) Clubs, except clubs the chief activity of which is a service customarily carried on as a business.

(5) Churches.

(6) Libraries or public museums.

(7) Municipal recreational uses.

(8) Railroad rights of way.

(9) Farming, gardening, nurseries or greenhouses.

(10) Apartment garages, without repair facilities or gasoline filling stations, each apartment of which shall have not over two private motor cars, may only be erected in alleys or on the rear of lot. After posting and advertising, if no protest is filed the Zoning Commissioner may issue a permit for same, but if any protest is filed the Board of Zoning Appeal shall decide whether said garage shall be permitted.

(b) In a residence district no building or land shall be used for any other than a use above specified for which buildings may be erected and for the accessory uses customarily incident thereto. The term "accessory use" shall not include a business not customarily or necessarily incident to the use of a building permitted in a residence district, nor shall it include any building or use not located on the same lot with the building or use to which it is accessory, nor shall it include window display or large signs. A garage for more than three motor vehicles or a stable for more than three horses or cows shall not be deemed an accessory use, but this provision in regard to stables shall not apply to any parcel of land of five acres or more in area, used as a market garden, farm or country place. In an accessory garage not more than one commercial vehicle may be stored therein.

V.

CONCLUSION, STATING RELIEF SOUGHT BY APPELLEE IN THIS COURT.

On page 53 of his reply brief, counsel for appellants again claims that the Supreme Court of Ohio has sweepingly upheld the Cincinnati Zoning Ordinance. The fact is that the decisions of the Supreme Court of Ohio in the two cases of the *City of Youngstown vs. Kahn Brothers Building Company,* 112 O. S. 654 and *Pritz vs. Messer,* 112 O. S. 628, give no comfort whatever to the appellants in this cause. In the *Youngstown* case the Supreme Court of Ohio held void an ordinance establishing a fraction only of the territory of a municipality into a district, and excluding apartment houses therefrom, on two grounds:

First, that such a district ordinance did not take into account the rest of the city and therefore could not be rationally regarded as taking a comprehensive view of the public welfare; and

Second, because the ordinance excluded an apartment house from a "most healthful part of the municipality in which to erect an apartment house and that the public health, morals and safety of the district and of the entire muncipality will not be impaired by the erecting of such an apartment house."

So far as the *Youngstown* case, therefore, is concerned, it is against the appellants here on both grounds, for the Village of Euclid is, in fact, a mere district of the metropolitan city of Cleveland and its ordinance, while comprehensive for the district, totally disregards and does not pretend to consider the rest of the great metropolitan area of which it is a part in every material aspect except the accident of political lines, and second, this case is against the appellants for it expressly holds that the pro-

hibition of an apartment house in a healthful part of a city constitutes a taking of property without due process of law and a taking of private property for public use without compensation and is therefore void.

The *Pritz* case does hold the Cincinnati comprehensive ordinance valid, but the language of the decision limits the validity of such ordinance to those provisions which are "reasonably necessary for the preservation of the public health, safety and morals" and the Court expressly reserves for future determination any question with regard to that ordinance which raises the question of "the validity of specific use restrictions in Cincinnati not covered in this case." See 112 O. S. 651 and also *Kahn vs. Youngstown*, 112 O. S. at page 660, where it is said in commenting upon the *Pritz* case:

> "Moreover the instant case differs from the *Pritz* case in the fact that the *Cincinnati* case, upon the record, did not raise the specific question as to whether property can legally be zoned in residence districts so as to exclude apartment houses which in other respects comply with valid building restrictions."

So that the most that can be claimed for the *Pritz* case is a declaration by the Court that it will sustain use regulations which are reasonably necessary for the preservation of the public health, safety and morals, and against that position we have nothing to urge.

The appellee believes that it is obviously entitled to a decree which will remove the restrictions imposed upon its lands. As these restrictions are parts of an ordinance so intimately integrated in its provisions that it would be impossible for the Court to say how much of the ordinance the Village of Euclid would have enacted had it known the real limitations upon its power, the appellee believes that the decree of the Court should declare the entire ordinance

invalid and leave to subsequent legislative action by the Village the making of those regulations which it deems in the public interest after it has been advised of the protection afforded by the Constitution of the United States to the rights of private property.

The appellee also believes that the entire ordinance should be declared invalid because its existence upon the statute books arrests the normal growth of the Village in which its lands lie and so deprives the appellee of the enhancement in value which it has a reasonable and legal right to expect and also because the appellee has a right to have the market for its land restored by the removal of the menace, implicit in the ordinance, that the Council of the Village of Euclid claims the power to destroy the value of land lying in it in the interest of undefined objects and to an extent and for purposes which will change from time to time with the personnel of the village legislature.

Respectfully submitted,

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